

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Wireless Telecommunications Bureau
Request for Comment on the Construction
Requirements for Commercial Wide-Area
800 MHz Licensees Pursuant to *Fresno Mobile*
Radio, Inc. v. FCC

PR Docket No. 93-144

REPLY COMMENTS OF SOUTHERN COMPANY

By: Carole C. Harris
Christine M. Gill
Thomas P. Steindler
Daniel R. Ball

McDermott, Will & Emery
600 13th Street, N.W.
Washington, DC 20005-3096
202-756-8000

Michael D. Rosenthal
Southern Communications Services, Inc.
5555 Glenridge Connector, Suite 500
Atlanta, GA 30342
(678) 443-1500

Attorneys for Southern Company

Dated: July 30, 1999

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REPLY COMMENTS OF SOUTHERN COMPANY

Southern Company ("Southern"), through its undersigned counsel, submits these reply comments in response to the comments submitted in the above-captioned proceeding.¹ In response to the remand by the U.S. Court of Appeals for the District of Columbia in *Fresno Mobile Radio, Inc. v. FCC*² the Wireless Telecommunications Bureau has requested comment on the construction requirements that the Commission should impose on 800 MHz Specialized Mobile Radio ("SMR") licensees operating wide area systems.

INTRODUCTION

Southern supported applying to 800 MHz Specialized Mobile Radio licensees operating wide area systems the same construction standards as are applied to Economic Area licensees in spectrum blocks D through V.³ Such construction requirements are required by the Budget Act,

¹ *Wireless Telecommunications Bureau Request for Comment on the Construction Requirements for Commercial Wide-Area 800 MHz Licensees Pursuant to Fresno Mobile Radio Inc. v. FCC*, DA 99-974, *Public Notice*, released May 21, 1999 ("FCC Public Notice").

² 165 F.3d 965, 970 (D.C. Cir. 1999) ("*Fresno*").

³ Comments of Southern Company, July 12, 1999 in response to the *FCC Public Notice*.

are in the public interest, and are administratively convenient for the Commission. Finally Southern suggested that the new construction requirement should be applied prospectively from the date the Commission completes this proceeding.

Without exception, the parties filing comments in this proceeding supported the general principle that wide area systems should be subject to construction requirements similar to those applied to Economic Area licensees.⁴ Given the unanimity on this central issue, Southern submits these reply comments merely to clarify ancillary issues raised by commentors in this proceeding.

I. The Construction Standards Adopted in this Proceeding Should be Applied to all 800 MHz Wide Area Systems Providing Commercial Mobile Radio Service.

As required by the 1993 Budget Act,⁵ and as explained in Southern's comments, population based construction standards should be applied to 800 MHz wide area CMRS providers. Mobile Relays, Inc., (Mobile Relays), with no apparent basis in law or public policy, argues that the regulatory parity required by the Budget Act—the basis of the D.C. Circuit's remand in *Fresno*—should not apply to certain channels used to provide CMRS based upon the way they were licensed. Mobile Relays argues that Business and Industrial/Land Transportation (B/ILT) channels were not the subject of the Commission's "new allocation rules"⁶ and should therefore be subject to the Commission's site-by-site construction requirements codified in 47 C.F.R. § 90.621(f)(2).⁷ In this Mobile Relays completely misses the point of the *Fresno* remand. The Budget Act mandates comparable construction requirements for providers of "substantially similar common carrier services..."⁸ As the Court noted in *Fresno*, to focus, as Mobile Relays

⁴ See Comments of Nextel Communications, Inc., Chadmoore Wireless Group, Inc, American Mobile Telecommunications Association, Inc., William R. Miller d/b/a/ Russ Miller Rental, and Southern Company, July 12, 1999, in response to the *FCC Public Notice*.

⁵ Section 6002(d)(3)(B), 1993 Budget Act, 107 Stat 312, 397.

⁶ Comments of Mobile Relays at 2.

⁷ Comments of Mobile Relays at 3.

⁸ Budget Act.

does, on the manner of licensing rather than on the service provided “elevates form over function” and does not “bear scrutiny.”⁹ The construction rules adopted by the Commission in this proceeding must apply to wide-area systems used to provide CMRS without regard for the manner of licensing.¹⁰

Mobile Relays similar arguments regarding “plan[s] to convert and upgrade an existing, analog SMR” are inapposite. Mobile Relays argues that such conversion is difficult. This has nothing to do with the issue of whether wide-area 800 MHz SMR systems provide services substantially similar to other CMRS providers or whether the construction requirements are comparable. It cannot therefore be the basis for denying regulatory parity to wide-area 800 MHz SMR systems that have offered state-of-the art technology from the beginning, thereby obviating the need to convert and upgrade from a lower quality system such as Mobile Relays’.

Finally, with regard to Mobile Relays’ suggestion that “the Commission require that the wide-area licensee demonstrate service is being provided to customers at each licensed transmitter site by at least two of the frequencies licensed as part of the wide-area system,”¹¹ Southern notes that Mobile Relays provides no basis for this proposed requirement except that “[t]wo channels are necessary to construct a trunked radio system, which is the format for which is [sic] wide-area system is licensed.”¹² Southern maintains that this is inadequate to justify deviation from the rules the Commission has already established for 800 MHz spectrum blocks D through V. For the reasons stated above, the Commission must apply the same rules to wide-area 800 MHz SMR systems as it applies to those similarly situated Economic Area systems.

⁹ *Fresno* at 969.

¹⁰ *Fresno* at 969.

¹¹ Comments of Mobile Relays at 5.

¹² *Id.* at n. 8.

II. Chadmoore's Request for Reinstatement is not Properly Before the Commission in this Proceeding.

Chadmoore Wireless Group, Inc. ("Chadmoore") maintains that the Commission is required to "retroactively reinstate licenses canceled after adoption of the First Report and Order."¹³ Without commenting on the merits of Chadmoore's request for reinstatement, or Chadmoore's standing to request the reinstatement of the estimated 2,000 licensees with which Chadmoore had entered into management and option agreements,¹⁴ Southern notes that the issue of reinstatement is not properly before the Commission in this proceeding. Chadmoore was denied extended implementation authority pursuant to 47 C.F.R. § 90.629 in 1995.¹⁵ Chadmoore's appeal of that decision was rejected by the D. C. Circuit in 1997.¹⁶ If Chadmoore wishes to appeal the cancellation of its licenses, it is entitled to do so to the extent it complies with 47 C.F.R. § 90.106,¹⁷ 47 C.F.R. § 90.115,¹⁸ or 47 U.S.C. § 402.¹⁹ It is not appropriate, however, in the context of either the D.C Circuit's remand in *Fresno* or in the *FCC Public Notice* for the Commission to address the reinstatement of licenses dismissed years ago. The Budget Act mandates regulatory parity for similarly situated CMRS providers. Chadmoore's reinstatement claims are "extraneous issues that would be more appropriately addressed elsewhere."²⁰ The Commission should not allow Chadmoore's extraneous issue of reinstatement

¹³ Comments of Chadmoore at 9.

¹⁴ Comments of Chadmoore at 3.

¹⁵ First R & O ¶ 114.

¹⁶ *Chadmoore Communications, Inc. v. FCC*, 113, F.2d 235 (D.C. Cir. 1997).

¹⁷ Petitions for reconsideration.

¹⁸ Application for review of action taken pursuant to delegated authority.

¹⁹ Proceedings to Enjoin, Set Aside, Annul, or Suspend Orders of the Commission. Southern notes that the Chadmoore's Petition for Review of the Commission's order In the Matter of Daniel R. Goodman, Receiver; Dr. Robert Chan; Petition for Waiver of Sections 90.633(c) and 1.1102 of the Commission's Rules; Request for Waiver of Section 90.633(c) of the Commission's Rules by Various 800 MHz SMR Licensees; Request for Waiver of Section 90.609(b) of the Commission's Rules Prohibiting the Transfer and Assignment of Unconstructed Licenses; Request for Extension of License Term of 800 MHz SMR Licensees, *Memorandum Opinion and Order and Order on Reconsideration*, 13 FC Rcd 21944 (D.C. Cir. 1998) was recently dismissed. *Daniel R. Goodman v. FCC*, 95-1585 (D.C. Cir. July 16, 1999).


²⁰ Amendment of Part 90 of the Commission's Rules Pertaining to End User and Mobile Licensing Information, *Report and Order*, PR Docket 92-78, 7 FCC Rcd 6344, n. 18 (1992).

to interfere with the expeditious resolution of the issues remanded to the Commission in *Fresno* and raised in the *FCC Public Notice*.²¹

CONCLUSION

WHEREFORE, THE PREMISES CONSIDERED, Southern Company urges the Commission to consider these reply comments and to proceed in a manner consistent with the views expressed herein.

Respectfully submitted,



Carole C. Harris
Christine M. Gill
Thomas P. Steindler
Daniel R. Ball

McDermott, Will & Emery
600 13th Street, N.W.
Washington, D.C. 20005

Michael D. Rosenthal
Southern Communications Services, Inc.
5555 Glenridge Connector, Suite 500
Atlanta, GA 30342

Attorneys for Southern Company

Dated: July 30, 1999

²¹ *Id.*

CERTIFICATE OF SERVICE

I, Jane Aguilard, hereby certify that copies of the foregoing Reply Comments of Southern Company were served this 30th day of July, 1999, by hand delivery on

Magalie R. Salas, Secretary
(Original and 4 Copies)
Federal Communications Commission
445 Twelfth Street, S.W., TW-A325
Washington, DC 20554

Scott A. Mackoul (2 copies)
Policy and Rules Branch
WTB Commercial Wireless Division
Federal Communications Commission
445 Twelfth Street, S.W., Room 4A-230
Washington, DC 20554

Don Johnson
WTB Commercial Wireless Division
Federal Communications Commission
445 Twelfth Street, S.W., Room 4-A325
Washington, DC 20554

Peter Tannenwald
Tara S. Becht
Irwin, Campbell & Tannenwald, P.C.
1730 Rhode Island Avenue, N.W., #200
Washington, DC 20036
*Counsel to Chadmoore Wireless
Group, Inc.*

Alan S. Tilles
Shulman, Rogers, Gandal, Pordy
& Ecker, P.A.
11921 Rockville Pike, Third Floor
Rockville, MD 20852-2891
Counsel to Mobile Relays, Inc.

Alan R. Shark, President
American Mobile Telecom. Assn, Inc.
1150 18th Street, N.W., Suite 250
Washington, DC 20036

Elizabeth R. Sachs
Lukas, Nace, Gutierrez & Sachs
1111 19th Street, N.W., Suite 1200
Washington, DC 20036
*Counsel to AMTA
and Russ Miller Rental*

Robert S. Foosaner
Lawrence R. Krevor
Laura L. Holloway
Nextel Communications, Inc.
2001 Edmund Halley Drive
Reston, VA 20191

International Transcription Service
1231 20th Street, N.W.
Washington, DC 20036


Jane Aguilard